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No. 19 & 25

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.,
Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA, Affiliated With the COMMITTEE FOR INDUSTRIAL ORGANIZATION,
Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR AMERICAN FEDERATION OF LABOR.

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STATEMENT.

In recent months it has become necessary for the American Federation of Labor to criticize certain aspects in the administration of an Act which has often been called "Labor's Magna Charta." In the case before the court there are involved a number of these criticism-compelling

practices. Foremost are these: The failure of the National Labor Relations Board to join labor organizations as parties to proceedings in which it is contemplated that contracts of these labor organizations will be adversely affected; the assertion by the Board of the right to enter orders nullifying collective bargaining contracts of national labor organizations when no question of domination by the employer is involved, and the organization does not seek exclusive representation; and the practice of the Board of prohibiting any expression by an employer or by minor supervisory employees of sympathy with or preference for the aims or ideals of national labor organizations in contravention of the right of free speech under penalty of invalidating contracts entered into in good faith. These are practices which have within the recent past adversely affected affiliates of the American Federation of Labor. A broad tendency for them to recur with expanding force can be noticed today. It is because of the belief that such practices on the part of the Board are unwarranted and unauthorized under the Act that the American Federation of Labor has asked indulgence to file this brief as amicus curiae.

RESUME OF FACTS IN AS FAR AS THEY CONCERN THE I. B. E. W.

Seven local affiliates of the International Brotherhood of Electrical Workers, and the International Brotherhood, all affiliated with the American Federation of Labor, had entered into collective bargaining contracts with the Consolidated Edison Company, a public utility located in New York City. Such contracts, by their terms, applied only to members of the Brotherhood. The Brotherhood did not seek exclusive representation of all employees of the Con-

solidated Edison Company. The undisputed testimony discloses, however, that approximately 30,000 out of a total of 38,000 of the company's employees had become members of the Brotherhood and had sought the benefits of its contracts. (See table in appendix hereto annexed and page 1418 of Record.) The contracts secured benefits and advantages for the workers, and sought to outlaw strikes and lockouts by providing for arbitration. While such contracts were still in effect, and at a time when an overwhelming number, **over 80 per cent of the total employees of the company, were members of the I. B. E. W. locals**, the United Electrical and Radio Workers of America, an affiliate of the Committee for Industrial Organization, brought charges against the Consolidated Edison Company claiming violations of Sections 8 (1), 8 (2) and 8 (3) of the National Labor Relations Act. Accordingly the Regional Director for New York issued a complaint, twenty-nine paragraphs of which contain allegations that the company, engaging in interstate commerce, had unlawfully discriminated against certain employees, which practice affected commerce, and one paragraph of which (paragraph 22) alleged briefly that the company in violation of Sections 8 (1) and 8 (2) of the Act had interfered with the rights of the workers to join labor organizations of their own choosing and had dominated the administration of the International Brotherhood of Electrical Workers local unions. The complaint did not allege that the practice set forth under Paragraph 22 affected interstate commerce, nor was there any question of representation raised anywhere in the complaint. This complaint was served on I. B. E. W. Local No. 3 which is an organization of employees working for private electrical contractors having no connection with the company, having no relation to any of the seven International Brother-

hood of Electrical Workers locals involved in this controversy, and having no interest in any of the contracts here under consideration. Subsequently during the hearings the original complaint was amended to charge that the practices mentioned in paragraph 22 affected commerce. In neither the original nor the amended complaint was there any charge or implication that the contracts in question were invalid, nor in fact was any mention of such contracts made. This amended complaint was never served on the International Brotherhood of Electrical Workers or any of its locals, although the Board claims having sent the complaint by registered mail. However, no return receipts have as yet been produced. The International Brotherhood of Electrical Workers or its locals did not participate in the hearings.

The hearings over, the Board summarily ordered all proceedings transferred to it, presumably under Section 37 of its Regulations. No intermediate report was filed. The Board allowed the parties no oral argument. A brief filed by the company "presumably was brought to the attention of the Board" (opinion of Circuit Court). Subsequently the Board announced its decision. The charges of domination and interference with the organization and administration of the I. B. E. W. locals under 8 (2) were dismissed. The company was found to have favored the A. F. of L. affiliates, and to have influenced its employees to join the A. F. of L.—in what numbers and to what extent is not specified. Accordingly the Board issued a cease and desist order concerning the practices of favoritism and interference, and in addition issued an order requiring the company to refrain from recognizing the I. B. E. W. contracts.

SUMMARY OF ARGUMENT.

It is submitted:

(1) That the Board lacked jurisdiction to make an order abrogating the I. B. E. W. contracts, because of its failure to join the International Brotherhood of Electrical Workers or its affiliates as formal parties, or to notify them of the commencement of proceedings in which action against their contract was contemplated; and that the entry of such order in the absence of the International Brotherhood of Electrical Workers was a denial of due process of law.

(2) That in any event the International Brotherhood of Electrical Workers was denied a hearing because the complaint did not apprise it of the charges of the action abrogating the contract contemplated thereunder, and no opportunity was given it to defend its interests.

(3) That the Act does not authorize the Board to issue orders invalidating or adversely affecting contracts entered into between the company and a bona fide labor organization not claiming the right to exclusive representation of all employees, and there is no showing that a substantial number of its members were influenced into joining, and where the company has been ordered to take other action fully protecting rights and privileges of its employees under the Act.

(4) That the Act does not authorize the Board to condemn expressions of sympathy by an employer or its supervisory employees with aims and principles of national labor organization affiliates, regardless of forms such expressions of sympathy take, if there is no actual compulsion to join, or any discriminatory acts threatened or taken.

ARGUMENT.

I.

The Board Lacked Jurisdiction to Make an Order Abrogating the I. B. E. W. Contracts, Because of Its Failure to Join the International Brotherhood of Electrical Workers or Its Affiliates as Formal Parties, or to Notify Them of the Commencement of Proceedings in Which Action Against Their Contract Was Contemplated; and That the Entry of Such Order in the Absence of the International Brotherhood of Electrical Workers Was a Denial of Due Process of Law.

Preliminary and as a prerequisite to the determination of the jurisdictional and due process questions, it is necessary to determine whether the Brotherhood or its affiliates are indispensable parties to the proceeding which sought to annul or which resulted in annulling the contracts to which the Brotherhoods were parties.

A. **The Brotherhood locals are indispensable parties. The necessity for their joinder is well established at common law and equity.**

Under equity and common-law practices, the necessity of their joinder can hardly be denied. The International Brotherhood of Electrical Workers' locals have a separate legal status under the law. This status is not challenged. The proceeding, as it finally resulted, sought to annul contracts to which the Brotherhood, as representative of such of the employees who were members were parties, and under which such members had acquired certain rights and privileges. Assuredly the suit was in every respect similar to one in equity for the recision or cancellation of a contract.

Sufficient authority to conclusively demonstrate that if the suit had been brought in a court of law the International Brotherhood of Electrical Workers would have been required as a necessary party is stated in the briefs of the Consolidated Edison Company and the International Brotherhood of Electrical Workers. See, also, **Gregory v. Stetson**, 133 U. S. 579, 10 Sup. Ct. Rep. 422, 33 L. Ed. 792. No strenuous objection to this contention was raised by opposing counsel, and no valid reason is or can be advanced why the same rule as to necessity should not be applied to administrative bodies when they conduct hearings possessing all the qualities and attributes of judicial proceedings. See **Morgan v. U. S.**, 298 U. S. 468.

B. **The N. L. R. B. v. Pennsylvania Greyhound Lines case, relied on by Board as to joinder, is not applicable.**

It is contended, and the Circuit Court has so held, that the Brotherhood was not a necessary party to the present proceedings because its status as an employee representative placed it within the rule announced by this court in **National Labor Relations Board v. Pennsylvania Greyhound Lines**, 303 U. S. 261. But the ruling there involved was based on the fact that the disregarded party was admittedly established, controlled and dominated by the employer—a "company union," as the term is used in its invidious sense. This court held merely that such company union was not necessary to the proceeding, first, because its presence was not necessary to determine whether the company had violated the Act, and, second, because the nonrecognition order merely required the employer to disestablish and cease to recognize this union. This was an act the employer alone could do, for the union was the creature of the company, was company promoted, was, in effect, merely the "alter ego" of the employer in so far as

its labor relations were concerned. If the union was not company-dominated, if it enjoyed a separate existence, the company could not possibly have taken effective action to disestablish it, and the order would necessarily have been a nullity. In that sense, the order did not run against the union, either actually or in effect, for the company, being actually in a position of control, could itself, alone, take the necessary steps to give effect to the order of disestablishment. If the Board had wished to order disestablishment of the union without finding it company-dominated, it would necessarily have had to join such union as a party, for no action it could command the company to take would have any effect as against that union, the company's support not being prerequisite to the union's existence.

This ruling in the **Pennsylvania Greyhound case** and the reasoning on which it was based cannot be said to apply to the present circumstances. It is evident, of course, that the presence of the International Brotherhood of Electrical locals would not be needed in order for the Board to determine whether the company had engaged in any practices contrary to the Act. And it is equally evident that the orders requiring the company to cease and desist from discouraging membership in the United Electrical and Radio Workers and encouraging membership in the International Brotherhood of Electrical Workers, or in other ways facilitating the International Brotherhood of Electrical Workers in soliciting membership, or from in any way persuading or coercing employees to join the International Brotherhood of Electrical Workers, or from recognizing the International Brotherhood of Electrical Workers as exclusive representative of its employees, which orders comprise all but one of the many orders issued against the company, do not run against the

Brotherhood in the sense designated in the Pennsylvania Greyhound Line case. However, concerning the order under Section (f), which requires the company to cease and desist from "giving effect to their contracts with the I. B. E. W.," the Board deeming such order appropriate and necessary, certainly such order did run against the Brotherhood, not, of course, in the sense that it was directed against it in so many words, but in the sense that it adversely affected it, as much as would any order of a court rescinding or canceling the same contract in a suit by the company or by the third party, United Electrical and Radio Workers.

The Brotherhood, unlike the company union in the Pennsylvania Greyhound case, did have an existence under the law, an existence unchallenged at the time of the entry of the order. The Board deemed it appropriate to the proper enforcement of the Act that the contract entered into between this body and the company which had been found guilty under the act should be dissolved. The Brotherhood and the American Federation of Labor believes such action inappropriate and unauthorized for reasons hereinafter to be stated; whether it was or was not is not immediately relevant, for, in any event, such order would necessarily have an important effect on the status of the Brotherhood contract and in that sense would run against it. The order in the Pennsylvania Greyhound case, as we have seen, was said not to run against the union there involved because it could not, unless the union affected was in fact company dominated. Such is not the fact here, and the company having no control over the Brotherhood, could not withdraw from the contract without invoving a third party having a separate existence.

In short, the present case in no way approaches the

situation condemned in the Pennsylvania Greyhound case, where the right hand was pretending not to know what the left hand was doing. It is true that in neither case was there any order directed **against** the union involved. But the question is not against whom is the order directed, but whom does the order substantially and adversely affect; to say otherwise would be casuistry of the most dangerous sort. The determination must be made through a finding as to the reality and substance of the effect of the order on outside parties, not as to its immediacy or direction. The inquiry in this type of case is never limited to ascertaining those parties against whom the order or decree could be said to be directed.

C. The failure to join the Brotherhood is a jurisdictional defect.

In **Minnesota v. Northern Securities Company**, 184 U. S. 199, 46 L. Ed. 499, which was a case involving an attempt by the State of Minnesota to enjoin a holding company from voting the stock of two corporations which the holding company controlled, this Court held that such two corporations were necessary and indispensable parties to the proceedings because of **possible** effects any injunctional decree issued against the holding company might have on such corporations. Likewise **Balter v. Ickes**, 89 F. (2d) 856, involves a situation parallel to the present one. There a suit by a nonparty to a certain contract was commenced, the effect of which suit would be to influence, although indirectly, the rights of the parties under the contract. The Court stated:

> "This is not a suit by one of the parties to the contract seeking to annul it, but by third parties asserting a somewhat questionable interest who attempted to defeat the carrying out of the agreement. It fol-

> lows, we think, that before any final decree adjudicating the issues can be entertained, all the parties to the contract must be before the court and given an opportunity to be heard."

The cases could be multiplied indefinitely. The mere assertion of the principle would seem authority enough.

It is, of course, no answer to say in denial of our claim for joinder that the order is appropriate in order to fulfill the purpose of the Act or to render effective the relief given; for mere necessity, however urgent, would be no excuse for failure to join. The fact, however, that in the present case the order was not necessary adds weight to the arguments for necessity of joinder and serves further to distinguish the Pennsylvania Greyhound case on the ground that there the action was appropriate, but here it is not. The lack of appropriateness of the present order is discussed at length elsewhere in this brief in connection with the question of the authority of the Board to enter the order under the circumstances here present.

The International Brotherhood of Electrical Workers and its locals being indispensable parties, it results that the Board was without jurisdiction to make the order under consideration.

In **Barney v. Baltimore**, 73 U. S. 280, 18 L. Ed. 825, the theory under which failure to join necessary or indispensable parties can be considered a jurisdictional defect is discussed at length. The rule has last been affirmed in **Employers Re-Insurance Corporation v. Bryant**, 299 U. S. 374, 81 L. Ed. 289, when the Court said:

> "By repeated decisions in this court it has been adjudged that the presence of the defendant in a suit in personam, such as the one now under discussion, is an essential element of the jurisdiction of a District

(formerly Circuit) court as a Federal Court, and that in the absence of this element the court is powerless to proceed to an adjudication."

See, also, **Balter v. Ickes**, supra.

The rule, of course, applies to administrative procedure when the tribunal involved is exercising quasi-judicial functions. See **Interstate Commerce Commission v. Louisville & N. R. Co.**, 227 U. S. 88, 33 Sup. Ct. Rep. 185, 57 L. Ed. 431.

D. **The Act does not and cannot dispense with the necessity of joining the Brotherhood.**

It was asserted by counsel for the Board that the rule of necessary parties is one applicable to equitable proceedings only, and has no application to a proceeding under a statute. If this argument assumes that the present proceeding lacks analogy to a proceeding in equity to rescind or cancel a contract, then, clearly, it is untenable, as has been demonstrated. If the argument asserts that the rule could be abrogated by statutory authorization, it is likewise in error, and for several reasons. Assuming that it is possible for the legislature to change the common-law rule, then strong and affirmative language to that effect would necessarily have to be employed to indicate such intention. Examination of the statute fails to disclose any such language; there is no declaration that any class of persons need not be joined, and there is nothing in the Act permitting the Board not to include as parties whomsoever may be necessary to adjudicate rights. That no particular procedure is prescribed by the act is not in itself conclusive, for common-law requirements necessary to give jurisdiction to take the action contemplated must

then be followed. Nor is it conclusive that the Act merely provides for a permissive intervention of interested parties. Certainly no such permitted intervention can be taken advantage of unless notice to those who under common law definitions may be indispensable is in some way given so that such parties can be informed of the necessity of taking action to protect their interests. The Brotherhood does not complain that, notice given, the initiative or burden of protecting its interests is cast upon it.

Counsel for the Board assert that the requirements of necessary parties can be altered in the interests of justice and is therefore not one of due process. But the second conclusion does not follow from the first. Admittedly it is within the power of the legislature to vary or alter the rule so as to permit, for instance, appearance by representation; but certainly it cannot be seriously contended that the permitted scope of change can extend to the complete elimination of parties whose rights will be affected by the proceedings. While the requirement is in one sense jurisdictional, in a larger sense it embodies due process principles in that the attempted enforcement of a decree in the absence of the party affected by the decree deprives such party of a hearing. These two concepts are interrelated and are used interchangeably by the courts. The case of **Barney v. Baltimore**, supra, contains a discussion of the due process as well as the jurisdictional phases of the doctrine, and we refer the Court to that decision. The general rule, as well as the exception thereto referred to by counsel for the Board, is stated in 12 C. J., 1227, Section 1003, as follows:

> "It is a fundamental principle of due process that the rights of a person may not be adjudicated in a proceeding to which he is not a party. Notwithstanding this general rule, however, it is competent for the

legislature in the interests of justice to provide that in certain cases the rights of persons may be affected by proceedings to which they are not made a party in person, but by representation only."

See, likewise, **State v. Guilbert** (Ohio), 47 N. E. 551.

E. The Brotherhood has not waived its rights by filing a petition for review.

It is claimed that the Brotherhood and its locals have waived their rights by filing a petition for review in the Circuit Court. The case of **New Orleans Debenture Co. v. Louisiana,** 180 U. S. 320, cited in support of this contention, is entirely inapplicable, for in that case the parties had appeared during the trial and in all of the proceedings up to and including the presentation of the case in the Supreme Court. In the present case it was not until the order abrogating their contracts was brought to the attention of the Brotherhood that it intervened, and this was only for the purpose of appealing to the Circuit Court of Appeals to request that this order be set aside. No other participation in the proceedings was ever had. It is difficult to see what other procedure than intervention could have been attempted by the Brotherhood in order to protect its rights. The fact that actual notice of the proceedings might have been had is immaterial. See **Cole v. Armour Fertilizer Works,** 237 U. S. 415, 59 L. Ed. 1027. A question relating to jurisdiction can be raised at any time in the proceedings.

F. The Brotherhood has never been properly served with notices of the proceedings.

Failure to join the International Brotherhood of Electrical Workers has been demonstrated to constitute a ju-

risdictional error and one depriving the parties of constitutional rights. Appellee asserts compliance with the requirements by service of notice of the proceedings on I. B. E. W. Local No. 3. This local admittedly has no interest in the subject matter of the suit, and is not and has not been shown to be an agent or duly authorized representative of the International Brotherhood of Electrical Workers or of the locals whose contracts were affected. Local 3 is an association of employees working for electrical contractors, and while affiliated with the International Brotherhood of Electrical Workers is in no way affiliated with or has it any connection with the seven locals here involved, which are organizations of public utility employees.

Whether service on a local union affiliated with an International Union is service on the International Union is a question that has been many times before the courts. See **Operative Plasterers Association v. Case**, 93 F. (2d) 56. No evidence justifying the Board's contention that service on the local would be service on the International has been introduced by the Board. It would appear that the Board has the burden of proof. Agency is a question of fact whose proof rests upon the party asserting its existence. **Schutz et al. v. Jordan et al.**, 35 L. Ed. 745, 141 U. S. 213. It is likewise the law that the burden of proving notice rests with the party relying on its existence (**Empire State Surety Co. v. Pac. Nat. Lumber Co.**, 200 Fed. 224). Without any other facts than those present in the record it would appear (and the fact is) that Local 3 is a distinct unrelated entity having no such connection with the International or the locals as would amount to imputation of notice. See **United Mine Workers v. Coronado Coal Company**, 259 U. S. 344, 60 L. Ed. 975; **Dean v. International Longshoremen's Association**, 17 Fed. Supp.

748; **Christian v. International Association of Machinists**, 7 Fed. (2d) 481.

Furthermore, the original complaint, which under the practice of the Board is the original notice, which was the only one in which any service at all was proved, failed to allege that the alleged illegal activities which might be said to affect the International Brotherhood of Electrical Workers affected interstate commerce. This, of course, is a vital element and the failure to allege this is destructive of the proceedings. See **United States v. Esnault-Peterie**, 299 U. S. 201, and **U. S. v. Seminole Nation**, 299 U. S. 214, 81 L. Ed. 316.

The charge that actual notice had been acquired by the International Brotherhood of Electrical Workers and its locals receives no support in the record. Even if it be assumed that actual notice was had, still this in not sufficient compliance with jurisdictional and due process requirements, the International Brotherhood of Electrical Workers and the locals involved having been given no opportunity to present evidence as a party to the proceedings. As stated in **Cole v. Armour Fertilizer Works**, 237 U. S. 413:

> "Nor can extra-official or actual notice of a hearing, granted as a matter of favor or discretion, be deemed a substantial substitute for the due process law that the constitution requires. In Stewart v. Palmer, 73 N. Y. 188*, the court said, 'It is not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing * * *.' The soundness of this doctrine has been repeatedly recognized by this court."

II.

In Any Event, the International Brotherhood of Electrical Workers Was Denied a Hearing Because the Complaint Did Not Apprise It of the Charges of the Action Abrogating the Contract Contemplated Thereunder, and No Opportunity Was Given It to Defend Its Interests.

Assuming a proper service has been made upon the I. B. E. W., and that the I. B. E. W. locals are necessary parties, due process considerations raise still another obstacle to the validity of appellee's course of procedure. In the present case the I. B. E. W. were never informed of any charges or complaints involving or requiring the abrogation of their contracts so as to be able to present a defense on this point until the order of abrogation was entered in its final form. As a result, the Brotherhood has been denied a hearing within the meaning of **Morgan v. U. S.**, 304 U. S. 1. The plea is not a technical one. Rather, the defect is one of substance. At no time until the entry of the final order was the Brotherhood aware or put on warning that the Board intended abrogating the contract. The Board's custom of filing an intermediate report, which may have apprised the Brotherhood that action was to be taken against it, and to have permitted it to make argument before the final order was entered, was omitted in this case. We are aware, under **N. L. R. B. v. Mackay Radio & Telegraph Co.**, 304 U. S. 33, decided May 16, 1938, that the absence of such intermediate report is not of itself a vital defect to the proceeding. However, that same case reiterated the rule that adverse parties to proceedings by administrative bodies are entitled to know the basis of the complaints against them and the action contemplated thereunder.

The parties in the present case, unlike those in the **Mackay case**, never knew of any complaint against them concerning the abrogation of their contracts, and were never informed that such action was contemplated against them. It cannot be said, as was said in the Mackay case, that at no time was there any misunderstanding of the basis of the Board's complaint. In the present case the Board's complaint, to the extent of twenty-two paragraphs, merely charged discriminatory conduct by the company. One paragraph, the only one which in any way might be said to relate to the Brotherhood, charged interference by the company with its employees' right to choose representatives. There were no allegations that the Brotherhood did not represent a majority of the employees, and there were no allegations that the contracts in question were entered into through coercion or against the will of the employees and did not represent their free choice. In fact, the contract was nowhere mentioned in either of the two complaints filed by the Board. The importance and the necessity of making such allegations will be shown in the discussion in argument IV, infra. Furthermore, it should be remembered that the Board and opposing Union admitted that no issue concerning representation was involved in this controversy. The evidence brought out at the hearings in no way indicated the contemplated cause of action; nothing was there present to show that it was intended to upset contracts entered into in good faith. While it is true that domination of the Union by the company was charged, these charges were not pressed, for in truth there was no basis for them, and such charges were in fact promptly dismissed.

Under such circumstances it is small wonder that the final order abrogating these contracts of the I. B. E. W. locals, which contracts purported to represent only mem-

bers of the union, came as a complete surprise. Under such circumstances the rule laid down in Morgan v. Wallace is entirely applicable. Here, as there, there is a complete absence of anything which would put the Brotherhood on warning as to the action contemplated by the Board or which would give it an opportunity to defend its rights under such contracts. The complaint fails entirely to disclose the contemplated action, and there was nothing in the proceedings which would give any intimation of the action to the Brotherhood. Finally, no intermediate report was filed before the final order was made. There is no proper hearing when the party does not know what issues are raised or what evidence is offered or considered thereunder and is given no opportunity to explain or refute it. **Interstate Commerce Commission v. Louisville & N. Ry.**, 227 U. S. 88, 57 L. Ed. 431. Judgment rendered against a party under a matter not within the pleadings, and not in fact litigated, is contrary to the fundamental principles of justice. **Reynolds v. Scheckton**, 140 U. S. 254, 35 L. Ed. 464. No hearing having been given which can in any way be said to conform to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature, such hearing must accordingly be stricken as invalid. **Morgan v. Wallace**, 304 U. S. 1.

III.

The Act Does Not Authorize the Board to Issue Orders Invalidating or Adversely Affecting Contracts Entered Into Between the Company and a Bona Fide Labor Organization Not Claiming the Right to Exclusive Representation of All Employees, and There Is no Showing That a Substantial Number of Its Members Were Influenced Into Joining, and Where the Company Has Been Ordered to Take Other Action Fully Protecting Rights and Privileges of Its Employees Under the Wagner Act.

We come now to a fundamental question: does the National Labor Relations Act clothe the Board with the power to issue an order abrogating the I. B. E. W. contracts to which 30,000 employees of the Consolidated Edison Company have bound themselves under the circumstances disclosed in the record? It is over this question that the American Federation of Labor is vitally concerned, for upon its determination depends the practicality of advocating the making of contracts seeking to minimize industrial disputes where minority (there being no majority representative) rather than a majority of the employees of a particular employer are to be represented, or where the contract, as in the instant case, does not seek exclusive representation and is binding only on such employees as are members of the labor organization in question.

A proper determination of the validity of the action here undertaken by the Board can be made only by a close scrutiny into the attending circumstances. The important facts are these:

1. The contract in question by its terms applied to and

bound only those employees of the Consolidated Edison Company who are members of the International Brotherhood of Electrical Workers. (Note 1.)

The Board claims that Carlisle, president of the Company, regarded the contract as one giving the Brotherhood sole bargaining rights. Carlisle's views have no effect on what is the actual contract and its legal import. Certainly the Brotherhood cannot be penalized for the president's views by having its contracts abrogated. If this was the effect desired by **both** the parties, would it not have been simple to inject a provision giving the Brotherhood exclusive representation? Further, as regards the statements of Carlisle, there is no showing or charge that the company failed to deal with any other group when requested.

The contract is in no sense a closed-shop contract. Any misunderstanding among the employees that it is, or that it purports to establish the International Brotherhood of Electrical Workers as an exclusive representative for all

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Note 1.

"ARTICLE I.

Scope.

1. This agreement shall apply to all employees of the Edison Company who are members of the Brotherhood and are engaged in operations essential to the furnishing of electric service to consumers, including meter readers, elevator operators, and other building employees, but not including general foremen or supervisors in charge of any classes of labor, watchmen or temporary employees.

ARTICLE II.

No Discrimination.

2. The Edison Company recognizes the Brotherhood as the collective bargaining agency for those employees who are members of the Brotherhood. The Edison Company recognizes, and will not interfere with, the right of its employees to become members of the Brotherhood, and agrees that there shall be no discrimination, interference, restraint or coercion by the Edison Company or any of its agents against any employee because of his membership in the Brotherhood. The Brotherhood agrees, for itself and its members, not to intimidate or coerce employees into membership in the Brotherhood and also agrees not to solicit membership on Edison Company time or property."

of the employees is effectively provided against by the Board's order forbidding the company to recognize the Union as the exclusive representative of the employees.

(2) It has been specifically found by the Board that the Brotherhood or its locals were not dominated nor their administration interfered with by the company, and there has been no order of disestablishment entered or any other action taken by the Board which directly or by inference refuses to recognize the legal existence of the Brotherhood and its locals as bona fide employee representatives.

(3) While interference by the company with its employees in the exercise of their rights to choose their own representatives has been found (although erroneously), it cannot be denied that employees of the company to the extent of at least one or two hundred, to use an extreme example, have not in any way been coerced, influenced or interfered with by the company into joining the Brotherhood. In all probability may thousands have voluntarily and without any hint of interference or persuasion become members of the locals. As to this no one can state, for the Board presented no findings as to what per cent of the employees it considered were interfered with, and there is nothing in the evidence to show whether ten, a hundred or a thousand employees were influenced into joining the I. B. E. W. against their will.

Under these circumstances—no domination of the unions, at least a minority of its members not interfered with or coerced, and the existence of a non-closed shop contract binding only on members of the union—we question the authority of the Board to abrogate the contracts in question.

Certainly there is no specific language authorizing such

conduct and certainly there is nothing in the purpose or policy of the Act which in reason or principle can justify interference of this nature. Rather the inference to be drawn from the language of the Act is that the right of a minority, assuming, of course, that there is no majority or exclusive representation contract in existence, to enter into contractual relations with the employer is to be fostered. Sections 7 and 8 of the Act guarantee the right of collective bargaining, and Section 9 (a) expressly provides that "any individual employee or group of employees shall have the right at any time to present grievances to their employer." While employers are not, of course, required to deal with organizations representing less than a majority, there is nothing in the Act, its scope, object or purpose, which invites the conclusion that the Act is designed to prevent or prohibit voluntary bargaining between the employer and any group of employees (when no single appropriate unit has a majority) or the making of contracts between such parties, provided the parties do not seek exclusive representation.

The only possible justification for abrogation of the contracts in the present case is to be found under Section 10 (c), which permits such affirmative action as will effectuate the policies of the Act. By this provision is claimed the authority to take appropriate action in each case to make effective the orders deemed necessary to protect the rights of employees under the Act.

But in the present case the employer has been required to cease and desist from all acts of interference or assistance or partiality and to post notice of such action and intention. The company has further been required to notify its employees that they are free to join any labor organization they wish and that it will bargain with any

organization chosen by the employees, and that the competing C. I. O. union will not be discriminated against. The employees, as commented on by the Circuit Court, have been given complete freedom to do as they please in the matter and have been completely informed of their rights. No right guaranteed by the Labor Act remains unprotected. Certainly to take the further action of abrogating contracts would be superfluous and assuredly, to warrant such action, additional findings to those that now appear in the record must be presented. As stated by this Court in **N. L. R. B. v. Pennsylvania Greyhound Lines**, 303 U. S. 261, the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress. Administrative action can go no further than necessary. Had the contract purported to be the exclusive bargaining instrument for all the employees, then very conceivably further action under which the effect of such contracts could be overcome might be considered appropriate.

It may be urged that the abrogation of the contracts might be considered appropriate in the sense that such action **might tend to** offset the interfering activities. But appropriateness in the sense of facilitation alone cannot be the touchstone, for under such reasoning almost any kind of preventive action could be permitted, and the field of permissive action would be widened to include whatever might possibly even imaginatively assist in making appropriate the order in question. For instance, in the present case an order of disestablishment of all seven I. B. E. W. locals would undoubtedly assist in removing all vestiges of interference with the employees, and in that sense would be appropriate under the theory contended for by the Board. What was done by the abrogation of the contract in the instant case affords another example. Here the

rights and interests of many thousands of employees are adversely affected concerning whom there has been no hint of coercion merely because such action might possibly facilitate in making effective the order. Action against the interests of these persons cannot be permitted merely because it might be construed appropriate in the abstract, particularly when the rights of innocent parties are affected.

Let us look for a moment at the practical effect that the order here entered would have, not only on the unions presently involved, but as regards future bargaining activities. Pragmatic observation of the consequence of sanctioning the action in the present case indicates quite clearly the danger and injustice involved.

To permit this unnecessary action abrogating these contracts under the guise of a precautionary measure engenders consequences to the I. B. E. W. of a serious and permanent nature and will unjustifiably inflict a blow upon its prestige in this particular plant from which it can hardly recover. It is inevitable that the conviction will have been instilled in the minds of the workers that this union whose contracts have been declared at an end has been deemed undesirable by the National Labor Relations Board to represent any of the company workers. There will arise suspicion, a suspicion fanned only too readily by competing organizations, that the contracts in question are illegal and do not protect the interests of the workers—that these contracts have been foisted on them in deprivation of their rights by a union acting in connivance with their employer. It is unjust and intolerable that the International Brotherhood of Electrical Workers should be forced to undergo the humiliation of such treatment, and should be exposed to the possibility of such lethal consequences, merely because the Board assumes, in the total

absence of supporting evidence, that such action is appropriate. Under similar, although less compelling, circumstances the Circuit Court of Appeals in **N. L. R. B. v. Remington Rand**, 94 F. (2d) 862, held in regard to an order of disestablishment:

> "* * * It appears to us not only redundant, but to carry a charge of disapproval which the act does not warrant. It is to be remembered that the order is to be posted in all the plants, and upon the minds of laymen the addendum is quite likely to impress an unfair stigma on these unions. Our order will not contain this provision."

These considerations are totally aside from a just regard for the hundreds or thousands of those members who cannot possibly be said to have been coerced or interfered with, and who sincerely wish to continue under the contract in question as they have successfully done from the beginning.

If we consider the consequences of approval by this Court of procedure so arbitrary and officious in nature as precedent for future action, the results are seen to be equally invidious. In few, if in any, instances will groups of employees, not purporting to represent all of the employees, feel free to enter into negotiations with the company for the purpose of improving their conditions or outlawing lockouts and strikes; for should the N. L. R. B. somehow or other find that one or more of its members has been coerced, the Board will have authority to upset such contracts and stigmatize their action, and this in addition to its right to admonish the employer concerning any such interfering activities and to require him to notify the employees fully of their rights. Or going a step further, an enterprising and unscrupulous employer could

circumvent the contract entered into in good faith by his employees **purporting to represent either a majority or a minority** of such employees by seeing to it that several of the members of the contracting union have been coerced into joining. There is no circumstance in the present case which would prevent such a widespread application of the doctrine here contended for by counsel for the Board.

Officiousness of this nature is exactly the type of conduct which so often brings the actions of administrative tribunals into disrepute. When the effect of this procedure can be as harmful as it undoubtedly will be here, a weighty consideration of these effects must and should be made before the proposed interference is permitted. Appeal is made to this Court to grant protection in this case by ordering the Board to refrain from interfering with these contracts.

IV.

The National Labor Relations Board Has Not Jurisdiction in This Case Because the Respondent Is Not Engaged in "Interstate Commerce" Within the Purview of the Act. The American Federation of Labor Has Fostered and Is Fostering State Labor Relations Acts, and Is Vitally Interested in Protecting the Jurisdiction of the State Boards Against Encroachment of the National Board.

With deep conviction, we subscribe to the argument of respondent on the subject of jurisdiction as it relates to "commerce." It is our opinion that the National Labor Relations Board does not have jurisdiction in the case for the record indicates conclusively that respondent is engaged in intrastate commerce. The brief of respondent

fully and ably presents the facts and the law on this subject. It is therefore unnecessary for us to cover this ground again. However, so that it be made clear to the court that we do have a direct and important interest in this phase of the case we desire to set forth briefly our reasons:

The American Federation of Labor has fostered and is fostering State Labor Relations Acts. Five states now have such laws, of which New York is one. In some of its provisions the New York Act is fairer to all parties involved in labor relations than the National Act. We do not seek unnecessary centralization. Where states do have jurisdiction in administrative matters affecting labor relations we desire the State Administrative Agencies to exercise the jurisdiction. We desire it even to the exclusion of the Federal agencies.

This Act was fostered by the American Federation of Labor. The administration of it by the National Board contrasted with the administration of the several State acts by State Boards compels us to assert that the administration of the State Act by the State Boards is infinitely better and more in keeping with the spirit and intent of the law than the administration of the Act by the National Board.

Lest the foregoing may be deemed an individual view of the writer we set forth the statement of the Executive Council of the American Federation of Labor made public October 3, 1938, printed on page 69 of the report submitted to the Convention of the American Federation of Labor now being held in Houston, Texas:

> It is with deep regret that frankness impels us to report to you that the National Labor Relations Board has administered the Act contrary to its letter, spirit

and intent, with manifest bias and prejudice against the American Federation of Labor and in favor of dual and rival organizations. Our resentment has been aroused and your officers have publicly and officially in most vigorous terms condemned this unholy alliance between a government agency exercising quasi-judicial jurisdiction and the C. I. O.

Increasing importance which attaches to the actions of the National Labor Relations Board is evidenced by the fact that in the three years of its existence the Board has handled 16,500 cases involving almost 4,000,000 workers. As the work of the Board grew so did its tendency to go beyond the direct Congressional mandate and gradually to apply its decisions not to the questions of Labor's basic rights which the Wagner Act had been designed to protect, but to the problems of form and structure of the labor movement itself.

That a three-man board, composed of men with no direct labor experience, should undertake to shape the form and structure of our labor movement through decisions clothed with judicial authority, aroused among our unions a growing feeling of apprehension and indignation. Aware of its solemn responsibility to preserve and perpetuate the basic democratic principle of Labor's self-determination and self-government, the entire membership of the American Federation of Labor has united in its protest against this unwelcome intervention in Labor's internal problems by a Government bureau. The American Federation of Labor is aware that problems which have emerged and developed over a period of fifty or sixty years—problems with which Labor has struggled for several generations—cannot and should not be settled by snap judgments of outsiders no matter how well-intentioned or learned they may be.

It is with this invasion of Labor's democratic sovereignty that we have found fault and not with the

principles and purposes which the Act embodies and which will always have our unyielding support.

The Board has exceeded its public purpose and has vitiated the procedure delineated in the Act in three respects:

First, in a large number of instances its agents have shown gross favoritism and bias in the handling of cases, furthering the objectives of one union against another and favoring one form of labor organization.

Second, by administrative fiat the Board has set aside legally valid and binding contracts entered into in good faith by bona fide unions and employers.

Third, through the arbitrary determination of appropriate units in cases dealing with the question concerning representation, the Board has sought to impose upon workers regardless of their wishes the type of organization it favored.

Before the United States Supreme Court on April 12, 1937, handed down the five epoch-making decisions, upholding the constitutionality of the National Labor Relations Act, the administration of the law by the National Labor Relations Board was on the whole, just and proper. Such errors as were committed, were the natural result of a newly constituted Government agency administering a newly created law. Since the decisions of the Supreme Court of April 12, 1937, the Board has abandoned whatever restraint it imposed upon itself prior to this date and has brazenly and by official acts declared itself as a proponent of the C. I. O. fostering its interests and by the effect of its decrees recruited membership for the C. I. O.

In the short period of time from April 12, 1937, to the date of the holding of the Denver Convention, the tendency on the part of some members of the Board to pervert the spirit and intent of the law became ap-

parent. The American Federation of Labor, desiring to maintain the substantial benefits of the Act and desiring to accord the Board the benefit of whatever doubt may have existed as to its apparent unfair attitude towards the American Federation of Labor, abstained from any official disapproval of the Board in the report of the Executive Council to the Denver Convention.

A study of numerous cases discloses the following:

1—The Board has thwarted the intent of Congress in determining what shall constitute an appropriate unit for the purpose of collective bargaining.

2—The Board has by its decisions determined that craft unions or other labor unions of long standing and affiliated with the American Federation of Labor have no right to free choice and self-organization. The Board has assumed the power to make the determination of the proper unit contrary to the desires and wishes of craft groups or other recognized constituted unions affiliated with the American Federation of Labor.

3—The assumption of power by the Board to disregard existing units of long standing and to substitute its own ideas and judgment of what shall constitute the proper unit has caused disintegration and in some cases virtual disestablishment of American Federation of Labor unions.

4—The pronouncements of the Board respecting the proper unit disclose the determination on the part of the Board to comply with the contentions and demands of the C. I. O. and to favor C. I. O. unions in an effort to destroy American Federation of Labor unions.

5—Great difficulty is experienced by many American Federation of Labor unions which are strong and clearly have a majority in a plant in

getting the Board to order an election, when requests therefor are made by American Federation of Labor unions. By comparison, C. I. O. unions have secured rapid compliance with similar requests on their part.

6—American Federation of Labor unions have experienced great difficulty in obtaining decisions by the Board after elections have been held, and after hearings have been had. Many decisions have been held up for many months and in some cases for the purpose of affording C. I. O. unions an advantage through the delay.

7—Lawyers and personnel of the regional labor boards have personal relationships with C. I. O. officials and have frequently advised and guided them in pending controversies with American Federation of Labor unions.

8—The National Labor Relations Board has in many cases built up a straw-man by the use of the word "favoritism" by the employer, as a result of which it has violated the sanctity of contractual obligations between employers and American Federation of Labor unions, has invalidated contracts and virtually disestablished existing American Federation of Labor unions.

9—The Board has instituted investigations and hearings at the request of small minorities of C. I. O. members for the purpose of assisting the C. I. O. in disrupting existing relations between the employers and American Federation of Labor unions.

We are, therefore, vitally concerned in the subject of jurisdiction. The instant case is one involving intrastate commerce. We want jurisdiction lodged in the State Board where we believe it belongs.

V.

The Act Does Not Authorize the Board to Condemn Expressions of Sympathy by an Employer or Its Supervisory Employees With Aims and Principles of National Labor Organization Affiliates, if There Is No Actual Compulsion to Join, or Any Discriminatory Acts Threatened or Taken.

It is our final contention that the expressions of sympathy or preference on the part of the employer for the Brotherhood relied on by the Board to support its order of violation of Section 8 (1), do not under the circumstances here presented warrant a finding of a violation of Section 8 (1), there being no actual coercion on the part of the company of its employees to join the Brotherhood, and the Brotherhood not seeking exclusive representation. It is submitted that the conduct of the company as disclosed in the evidence does not under the circumstances involved constitute an interference or coercion within the meaning of the term as used in the Act, and a repudiation of said conduct is a denial of the right to free speech or the free expression of opinion. The evidence adduced by the Board at the hearing, even under the interpretation given it by attorneys for the Board, discloses at most an attitude by the company of preference for the A. F. of L. Union over the CIO Union. As to the extent of the conduct consistent with this admitted preference, suffice it to say that in the light of the record no conduct can be imputed to the company which would amount to coercion in the sense of compulsion as the term is usually understood, or to anything approaching the forcing of the employees to join the Brotherhood against their wishes, under threats and intimidation or the like. Certainly noth-

ing underhanded or malicious can be imputed to the Company. In this connection it is very significant to note that no employee testified at the hearings that he joined the Brotherhood because he was afraid not to. And, in fact, all employees had been expressly informed by the President that they were free to join any organization they chose, and the very wording of the contracts permitted them to do so, and to shift their affiliation whenever they or any of them were inclined to do so.

It is our contention that, where a national labor organization is involved, there must be showing of an actual coercion or compulsion in the sense of overcoming the will, before the conduct involved can be considered a violation of the Act, for it is not reasonable to suppose that mere innuendo, expressions of preferences on the part of the employer should have the same effect on employees in such a case as it might have were a company-dominated union the object of the influencing activities.

Before proceeding further with the discussion it is necessary to examine the language of the Act and to ascertain the meaning of such language. The Act, Section 8, prescribes that it shall be an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed" under the Act—i. e., to self-organization, to join labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid or protection. This provision of the Act has been borrowed from a similar provision of the Railway Labor Act, which employs the language, "without interference, influence or coercion over the self-organization or designation of representatives." This court, in the case of **Texas and New Orleans Railway Company v. Brotherhood of Railway & Steamship Clerks**, 281 U. S. 548, 74 L. Ed.

1034, has indicated the extent and purport of these words. As stated by the Court (page 1045):

> "• • • The intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well-understood concepts of the law. The meaning of the word 'influence' in this clause may be gathered from the context. Virginia v. Tennessee, 148 U. S. 503, 519, 37 L. Ed. 537, 543, 13 Sup. Ct. Rep. 728. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. **'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' The phrase covers the abuse of relation or opportunity so as to corrupt or override the will,** and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this act than in relation to well-known applications of the law with respect to fraud, duress and undue influence. • • •"

For the most part, action of the type here condemned has been undertaken in connection with a company-organized or company-dominated union. It is this circumstance which gives a substance of coercion to the otherwise harmless conduct of the employer. However, there is here present a national labor organization, no question of whose bona fide capacity or intent to represent the employees' interest can be or has been raised. It is submitted that this fact is one which casts an entirely different light upon the alleged coercive conduct—that there is presented an entirely different stage or background, so to speak, upon which such action is undertaken. This

circumstance renders conduct which in other circumstances might be considered at least morally coercive, in this instance entirely innocuous, and no more than an assertion of the inalienable right of all to give voice to an opinion or expression of belief. Here all demonstrations of sympathy or favoritism are made only in connection with a national labor organization.

The act was fostered by national organizations to overcome an evil, the evil of the company union. It was not considered an evil for employers to bargain with national labor organizations, nor was the act intended to pronounce favorable expressions of an employer for a national organization, even though they led to union affiliation by workers to be illegal, nor was it intended that such expressions shall be condemned. It is not the purpose of the act to condemn conduct which does not reach the extent of an actual compulsion, unless it is the purpose of the Act to arbitrarily condemn all action which can in any way be said to interfere with the workers regardless of the reality or substance of the interference, and regardless of to what extent the right of free speech may be impugned. But normal expressions are here inhibited, and this evidently is the interpretation adopted by the Board where in its alleged zeal to execute the letter of the Act it has forgotten its purpose. Such an interpretation forgets that the language defining the offense must at all times be circumscribed and restrained by what the spirit and purpose of the legislation portends. Otherwise administrative discretion, bounded only by the extent of administrative assumed expertness, will become vagrant and inquisitory, for assuredly the scope and breadth of the terms used to outline unfair labor practices, "interfere with," "restrain," "coerce," are in their natural state

unrestricted by confinement to the avowed purpose of legislation and therefore capable of including a variety of conduct entirely foreign to the purpose of the Act. Section 8 (1) is not intended as a legislative catch-all. Any action alleged to be coercive or alleged to interfere with the workers must be of a substantial or at least a real nature, and not such as could **possibly**, or as one could **imagine** would, affect the workers. This has clearly been stated by this Court. See **Texas & New Orleans case**, supra. A literal construction inconsistent with the policy of the legislature which promotes injustice or unreasonable or arbitrary results, cannot be permitted. As stated in **U. S. v. Cass**, 271 U. S. 354, 70 L. Ed. 983:

> "All laws are to be given a sensible construction; and a literal application of the statutes which would lead to absurd consequences should be avoided whenever a reasonable application can be given to it consistent with the legislative purpose."

General terms or words should be so limited in their application as not to lead to injustice or oppression. The reason of the law must in all cases prevail over the letter. It is the purpose of the Act to prevent the foisting of company unions or of unions not truly representative of the employees upon the workers. Such unions serving the employer's interest, rather than the employees', do not settle industrial strife, but, rather, embroil such strife and propagate dissatisfaction. The practice of foisting such company unions upon employers is obviated by forbidding coercion or intimidation or deceitful induction of employees into such unions in order that the right to bargain through a truly representative organization may be guaranteed. It is likewise the purpose of the Act to prevent interference with the employees' free choice, but this in-

terference must, as we have seen, be a substantial one within the spirit and intent of the law. It is not the purpose of the Act to curtail the employers' liberty of speech to the extent that he may not express honest opinions or indicate reasonable preferences when there can be created thereby no possibility that the right of employees to bargain through bona fide representatives of their own choosing will be lost. The present case permits of no such possibility.

It cannot be too strongly stressed that the substance and reality of the effect of any alleged unlawful action must prevail if officious activity of the Board is to be in any way curtailed. The presence of a national labor organization is a factor of extreme importance. The Board has failed to distinguish such a situation from one in which a company-dominated union is involved. An additional factor of great importance is that the employees of the Consolidated Edison Company were expressly told by the president of the company that they were free to join or not to join any organization they wished. (Note 1.) Finally, and almost conclusively, if the matter is to be regarded in any sort of a realistic fashion, we must consider the fact that the undisputed testimony discloses that 30,000 out of a total of 38,000 of the employees were members of the Brotherhood. To force this large number of workers to become members of the I. B. E. W. against their will would require coercive methods of Herculean

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Note 1. Mr. Carlisle, president of the company, addressing a large meeting of the employees on April 22nd, made the following statement (R. 1209 et seq.):

> "Let me say it very plainly, no member working for this company has got to do anything except what they want to do individually, on their own. I will be very clear about that. It is your selection. You are to do as you please. We are not taking the position that you must do this or you cannot do this. You have to make the choice. * * * You go out and do what you want."

proportions—at least far in excess of any disclosed in this record. It is difficult to see how any activities of the employer here condemned could "in fact or in effect" effectively operate to induce these employees to become members against their will.

In the past years the union movement has unfortunately become competitive. As a result, or perhaps as a cause, each of the two main competitors have adopted certain policies and principles to which it adhered and which it announces to the world, and which serve to add to or detract from their standing with the public, the workers, and with the employers. By way of illustration, the American Federation of Labor, for reasons irrelevant to this discussion, has condemned and refused to sanction the sitdown strike. This policy, or another one, might find favor or disfavor with some employers, as well as with some employees. What in the Act is there to prevent such employer from expressing a preference, in case he has one, as to one or the other organizations based upon that which the organizations themselves proclaim as their principles and upon which they seek to obtain membership of workers and agreements from employers? Are cooperation between employer and labor to be outlawed and the relationship of enmity to be fostered? Such is, evidently the Board's construction of the purpose of the Act. We, of course, have no reference to a situation where the conduct of the employer goes beyond mere indication of a preference, or expressions of opinions, and where the company acts favorably to one as against the other to such an extent as to actually force or intimidate the employees into such union against their will. We have not that situation here. At most, it can be said we have here merely a situation of a national union whose standing has found favor with the employer. It would seem more the

object of the Board, in keeping with the purpose of the Act, to continue and foster such friendship instead of seeking to condemn it.

The question of the effect of the conduct here involved on the employee is not one which will have to involve metaphysical or psychological refinements. Using the test of reasonable men it will be fairly simple to ascertain in each case whether in fact there was coercion or intimidation, and whether the men were deprived of their free will. In the present case the employees knew they were free to do as they wished, having been expressly told so by their employer. Even if we are to assume that the employer did indicate preference for one of two competing unions, but when such competing unions are national organizations it cannot be said that there is present by such expression of opinion the moral persuasion involved in those cases where the employer influence is brought to bear on behalf of a union of its own establishment. Likewise there would be none of the element of force incident to joining the union seeking and securing exclusive jurisdiction over the employees. Carlisle's personal opinion that the contract was exclusive (uncommunicated to the employees at large) is not conclusive that it was, and certainly a mere glance at the provisions of the contract indicates that it was not, and there is no evidence of any misstatement on this score by the union to the men. If an actual coercion by the company was intended, it would have been comparatively simple for the company to have made a contract for exclusive representation with its favorite union.

Certainly the presence of a national labor organization casts a mitigating light on all conduct of the employer here condemned. Thirty thousand men must be accorded some degree of understanding and comprehension, and it

cannot be presumed that they would act irrationally in the matter. This consideration has been entirely disregarded by the Board.

We respectfully submit, for the reasons hereinbefore set forth, the judgment of the Circuit Court of Appeals be reversed.

Respectfully submitted,

JOSEPH A. PADWAY,
Counsel, American Federation of Labor.

RESPONDENTS' EXHIBIT NO. 16.

MEMBERSHIP OF LOCAL UNIONS OF THE I B E W HAVING COLLECTIVE BARGAINING AGREEMENTS WITH COMPANIES OF THE CONSOLIDATED EDISON COMPANY OF NEW YORK, C., GROUP OF COMPANIES.

Membership of Local Unions of the I B E W Having Collective Bargaining Agreements With Companies of the Consolidated Edison Company of New York, Inc., Group of Companies.

(Data furnished to the Companies by the I B E W as of June 29, 1937.)

Local Union No.	Employees eligible to I B E W membership	Total membership	Per cent of eligibles	Paid-up members	Per cent of eligibles	Cards signed but dues not yet paid	Per cent of eligibles
B-825 (Brooklyn Edison Company, Inc.)	8,100	7,200	89.0	6,150	76.0	1,050	12.9
B-826 (New York Steam Corporation)	970	910	93.7	850	87.7	60	6.1
B-828 (Consolidated Telegraph and Electrical Subway Company)	1,600	1,534	96.1	1,534	96.1	0	0
B-829 (Consolidated Edison Company of New York, Inc.—Electric)	13,200	8,680	65.8	6,018	45.6	2,662	20.2
B-830 (Consolidated Edison Company of New York, Inc.—Gas)	7,000	5,644	80.6	4,144	59.1	150	2.1
B-832 (Westchester Lighting Company)	3,082	2,968	96.3	2,375	77.1	593	19.2
B-839 (New York and Queens Electric Light and Power Company)	4,200	3,387	84.2	2,637	62.7	900	21.4
Totals	38,152	30,473	80.0%	23,708	62.2%	6,765	17.7%

SUPREME COURT OF THE UNITED STATES.

Nos. 19, 25.—October Term, 1938.

Consolidated Edison Company of New York, Inc., and its Affiliated Companies, et al., Petitioners,
19 *vs.*
National Labor Relations Board, et al.

International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers, Local Union No. B-825, et al., Petitioners,
25 *vs.*
National Labor Relations Board, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 5, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The United Electrical and Radio Workers of America, affiliated with the Committee for Industrial Organization, filed a charge, on May 5, 1937, with the National Labor Relations Board that the Consolidated Edison Company of New York and its affiliated companies were interfering with the right of their employees to form, join or assist labor organizations of their own choosing and were contributing financial and other support, in the manner described, to the International Brotherhood of Electrical Workers, an affiliate of the American Federation of Labor. The Board issued its complaint and the employing companies, appearing specially, challenged its jurisdiction. On the denial of their request that this question be determined initially, the companies filed answers reserving their jurisdictional objections. After the taking of evidence before a trial examiner, the proceeding was transferred to the Board which on November 10, 1937, made its findings and order.

The order directed the companies to desist from labor practices found to be unfair and in violation of Section 8 (1) and (3) of the National Labor Relations Act,[1] directed reinstatement of six

[1] 49 Stat. 449; 29 U. S. C. Secs. 158(1)(3).

discharged employees with back pay, and required the posting of notices to the effect that the companies would cease the described practices and that their employees were free to join or assist any labor organization for the purpose of collective bargaining and would not be subject to discharge or to any discrimination by reason of their choice. 4 N. L. R. B. 71.

It appeared that between May 28, 1937, and June 16, 1937, the companies had entered into agreements with the International Brotherhood of Electrical Workers and its local unions, providing for the recognition of the Brotherhood as the collective bargaining agency for those employees who were its members, and containing various stipulations as to hours, working conditions, wages, etc., and for arbitration in the event of disputes. The Board found that these contracts were executed under such circumstances that they were invalid and required the companies to desist from giving them effect. *Id.* At the same time the Board decided that the companies had not engaged in unfair labor practices within the meaning of Section 8(2) of the Act.[2] That clause makes it an unfair labor practice to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it". Accordingly the order dismissed the complaint, so far as it alleged a violation of Section 8(2), without prejudice. *Id.*

The companies petitioned the Circuit Court of Appeals to set aside the order and a petition for the same purpose was presented by the Brotherhood and its locals. These labor organizations had not been parties to the proceeding before the Board but intervened in the Court of Appeals as parties aggrieved by the invalidation of their contracts. The Board in turn asked the court to enforce the order. The United Electrical and Radio Workers of America appeared in support of the Board. The court granted the Board's petition (95 F. (2d) 390). We issued writs of certiorari upon applications of the companies (No. 19) and of the Brotherhood and its locals (No. 25). May 16, 1938.

The questions presented relate (1) to the jurisdiction of the Board; (2) to the fairness of the hearing; (3) to the sufficiency of the evidence to sustain the findings of the Board with respect

[2] 29 U. S. C. 158(2).

to coercive practices, discrimination and the discharge of employees; and (4) to the invalidation of the contracts with the Brotherhood and its locals.

The pertinent facts will be considered in connection with our discussion of these questions.

First.—The jurisdiction of the Board.—That is, was the proceeding within the scope of its authority validly conferred? The petitioning companies constitute an integrated system. With the exception of one company which maintains underground ducts for electrical conductors in New York City, they are all public utilities engaged in supplying electric energy, gas and steam (and certain by-products) within that City and adjacent Westchester County. The enterprise is one of great magnitude. The companies serve over 3,500,000 electric and gas customers,—a large majority using the service for residential and domestic purposes. In 1936 the companies supplied about 97.5 per cent. of the total electric energy sold in the City of New York and about one hundred per cent of that sold in Westchester County. They do not sell for resale without the State. They have about 42,000 employees, their total payrolls in 1936, with retirement annuities and separation allowances, amounting to nearly $82,000,000.

Petitioners urge that these predominant intrastate activities, carried on under the plenary control of the State of New York in the exercise of its police power, are not subject to federal authority. It does not follow, however, because these operations of the utilities are of vast concern to the people of the City and State of New York, that they do not also involve the interests of interstate and foreign commerce in such a degree that the Federal Government was entitled to intervene for their protection. For example, the governance of the intrastate rates of a railroad company may be of great importance to the State and an appropriate object of the exertion of its power, but the Federal Government may still intervene to protect interstate commerce from injury caused by intrastate operations and to that end may override intrastate rates and supply a dominant federal rule. *The Shreveport Case*, 234 U. S. 342; *Wisconsin Railroad Commission* v. *Chicago, B. & Q. Rwy. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591. See, also, *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 37-41.

In the present instance we may lay on one side, as did the Circuit Court of Appeals, the mere purchases by the utilities of the supplies of oil, coal, etc., although very large, which come from without the State and are consumed in the generation and distribution of electric energy and gas. Apart from those purchases, there is undisputed and impressive evidence of the dependence of interstate and foreign commerce upon the continuity of the service of the petitioning companies. They supply electric energy to the New York Central Railroad Company, the New York, New Haven and Hartford Railroad Company, and the Hudson and Manhattan Railroad Company (operating a tunnel service to New Jersey) for the lighting and operation of passenger and freight terminals, and for the movement of interstate trains. They supply the Port of New York Authority with electric energy for the operation of its terminal and the Holland Tunnel. They supply a majority of the piers of trans-Atlantic and coastal steamship companies along the North and East Rivers, within the City of New York, for lighting, freight handling and related uses. They serve the Western Union Telegraph Company, the Postal Telegraph Company, and the New York Telephone Company with power for transmitting and receiving messages, local and interstate. They supply electric energy for the trans-Atlantic radio service of the Radio Corporation of America. They provide electric energy for the Floyd Bennett Air Field in Brooklyn for various purposes, including field illumination, a radio beam and obstruction lighting. Under contracts with the Federal Government they supply electric energy for six lighthouses and eight beacon or harbor lights; also light, heat and power for the general post office and branch post offices, the United States Barge Office, the Customs House, appraisers' warehouse and various federal office buildings.

It cannot be doubted that these activities, while conducted within the State, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power. The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by

the Circuit Court of Appeals in these words: "Instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electric energy, would be greatly impeded. Such effects we cannot regard as indirect and remote". 95 F. (2d) 390, 894.

If industrial strife due to unfair labor practices actually brought about such a catastrophe, we suppose that no one would question the authority of the Federal Government to intervene in order to facilitate the settlement of the dispute and the resumption of the essential service to interstate and foreign commerce. But it cannot be maintained that the exertion of federal power must await the disruption of that commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act.

Congress did not attempt to deal with particular instances. It created for that purpose the National Labor Relations Board. In conferring authority upon that Board, Congress had regard to the limitations of the constitutional grant of federal power. Thus, the "commerce" contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce. The unfair labor practices which the Act purports to reach are those affecting that commerce. Section 10(a).[1] In determining the constitutional bounds of the authority conferred, we have applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion. It is not necessary to repeat what we said upon this point in the review of our decisions in the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, *supra*. And whether or not particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise. *Id.*, see, also, *Santa Cruz Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466, 467.

Petitioners urge that the legislature of New York has enacted comprehensive and adequate measures to protect against the inter-

[1] 29 U. S. C. 160(a).

ruption of petitioners' services through labor disputes. Not only has the State long had legislation relating to the operations of public utility companies (Public Service Law) but the legislature has recently enacted the New York State Labor Relations Act (Laws of 1937, Chapter 443, effective July 1, 1937; Article 20 of the Labor Law) which provides a complete supervision of labor relations for employers in intrastate enterprises similar to that set up by the National Labor Relations Act with respect to interstate or foreign commerce. The state act, with added details, follows closely the national act. The state act provides for collective bargaining, including the conduct of elections to determine the representation of employees, and empowers the state Labor Relations Board to prevent unfair labor practices. In seeking to avoid a clash with federal authority, the state act is made inapplicable "to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act".[4] It is manifest that the enactment of this state law could not override the constitutional authority of the Federal Government. The State could not add to or detract from that authority. But it is also true that where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' intrastate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances including the bearing and effect of any protective action to the same end already taken under state ar rity. The justification for the exercise of federal power should clearly appear. *Florida* v. *United States*, 282 U. S. 194, 211, 212. But the question in such a case would relate not to the existence of the federal power but to the propriety of its exercise on a given state of facts.

In the instant case, not only was this proceeding instituted before the New York Labor Relations Act became effective but, so far as

[4] New York State Labor Relations Act, Section 715.

appears, no proceedings have been taken under it in relation to the unfair labor practices here alleged For the present purpose, it is sufficient to say that there has been no exertion of state authority which can be taken to remove the need for the exertion of federal authority to protect interstate and foreign commerce. The exercise of the federal power to protect interstate and foreign commerce from injury does not depend upon a clash with state action and need not await the exercise of state authority.

We conclude that the Board had authority to entertain this proceeding against the petitioning companies.

Second.—The fairness of the hearing,—procedural due process. Apart from the action of the Board with respect to the Brotherhood contracts, which we shall consider separately, the contentions under this head relate (1) to amendments of the complaint, (2) to the refusal to hear certain witnesses, and (3) to the transfer of the proceeding to the Board and its determination without an intermediate report or opportunity for hearing upon proposed findings.

The original complaint related to the discharge of five employees and alleged unfair labor practices in the employment of industrial spies and undercover operatives, in allowing employees to solicit membership in the Brotherhood during working hours and on the property of the companies, in compensating such employees while so engaged and in furnishing them office space and financial assistance while refusing such privileges to the United, and generally in coercion of the employees to join the Brotherhood. The amendments were made from time to time in the course of the hearing. In particular, they added another employee to those alleged to have been wrongfully discharged and supplied an omitted allegation that the other unfair labor practices affected commerce. At the close of the evidence the trial examiner granted a motion to conform the pleadings to the proof on the statement of the attorney for the Board that no important change was intended and that the amendment was sought merely to make more definite and certain what appeared in the complaint. These were discretionary rulings which afford no ground for challenging the validity of the hearing.

A more serious question grows out of the refusal to receive the testimony of certain witnesses. The taking of evidence began on June 3, 1937, and was continued from time to time until June 23d when the attorney for the Board unexpectedly announced that

its case would probably be closed on the following day. At that time the Board completed its proof, with the reservation of one matter, and at the request of the companies' counsel the hearing was adjourned until July 6th in order that Mr. Carlisle, the chairman of the board of trustees of the Consolidated Edison Company, and Mr. Dean, the vice president of one of its affiliates, who were then unavailable, could testify. In response to the examiner's inquiry, the companies' counsel stated that the direct examination of all witnesses on their behalf would not occupy more than a day. On July 6th the testimony of Mr. Carlisle and Mr. Dean was taken and the companies also offered the testimony of two other witnesses (then present in the hearing room) in relation to the discharge of the employee with respect to whom the complaint had been amended as above stated. The examiner refused to receive this testimony following a ruling of the Board (made in the course of correspondence with the companies' counsel during the adjournment) to the effect that no other testimony than that of Mr. Carlisle and Mr. Dean would be received on the adjourned day. An offer of proof was made which showed the testimony to be highly important with respect to the reasons for the discharge. It was brief and could have been received at once without any undue delay in the closing of the hearing.

We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. Section 10(e)(f).[5] Petitioners did not avail themselves of this appropriate procedure.

Shortly after the evidence was closed, the counsel for the petitioning companies filed a brief with the trial examiner. Several weeks later, on September 29th, the proceeding was transferred to the Board. The examiner made no tentative report or findings and there was no opportunity for a hearing before the Board itself. It must be assumed, however, that the brief for the companies was transmitted to the Board and was considered by it in making its

[5] 29 U. S. C. 160(e)(f).

decision. The Board contends that the companies submitted their brief without asking for an oral argument, as contemplated by the Board's rule (Rule 29), or for an intermediate report, and hence that they are not in a position to complain on either score. The Board also insists that after the transfer of the proceeding, it was within the discretion of the Board to adopt any one of the courses of procedure enumerated in its rule (Rule 38)[6] of which petitioners were informed by the service of a copy of the Board's rules at the beginning of the proceeding. Petitioners say that at the very outset they had asked, on their special appearance, for a hearing before

[6] Rules 37 and 38 are as follows:

"Sec. 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge to be filed with it, in Washington, D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceeding which may have been instituted in respect thereto—

(a) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(b) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region; or

(c) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in or transferred to such other Region, or for any other purpose.

The provisions of Sections 3 to 31, inclusive, of this Article shall, in so far as applicable, apply to proceedings before the Board pursuant to this Section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this Section, be reserved to and exercised by the Board. After the transfer of any charge and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to this Section, the provisions of Sections 3 to 36, inclusive, of this Article, shall apply to such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

"Sec. 38. After a hearing for the purpose of taking evidence upon the complaint in any proceeding over which the Board has assumed jurisdiction in accordance with Section 37 of this Article, the Board may—

(a) direct that the Trial Examiner prepare an Intermediate Report, in which case the provisions of Sections 32 to 36, inclusive, of this Article shall in so far as applicable govern subsequent procedure, and the powers granted to Regional Directors in such provisions shall for the purpose of this Section be reserved to and exercised by the Board; or

(b) decide the matter forthwith upon the record, or after the filing of briefs or oral argument; or

(c) reopen the record and receive further evidence, or require the taking of further evidence before a member of the Board, or other agent or agency; or

(d) make other disposition of the case.

The Board shall notify the parties of the time and place of any such submission of briefs, oral argument, or taking of further evidence".

the Board upon the question of its jurisdiction and that all proceedings be transferred to the Board, and that the rules induced the belief that after the transfer to the Board at the close of the evidence there would be further proceedings at which they would be heard. But we cannot say that the rules justified that expectation or dispensed with the necessity, after the transfer, of a suitable request by the petitioners for such additional hearing as they desired. It does not appear that such request was made.

It cannot be said that the Board did not consider the evidence or the petitioners' brief or failed to make its own findings in the light of that evidence and argument. It would have been better practice for the Board to have directed the examiner to make a tentative report with an opportunity for exceptions and argument thereon. But, aside from the question of the Brotherhood contracts, we find no basis for concluding that the issues and contentions were not clearly defined and that the petitioning companies were not fully advised of them. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350, 351. The points raised as to the lack of procedural due process in this relation cannot be sustained.

Third.—The sufficiency of the evidence to sustain the findings of the Board with respect to coercive practices, discrimination and discharge of employees.—The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by "substantial" evidence, merely considered whether the record was "wholly barren of evidence" to support them. We agree that the statute, in providing that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive", means supported by substantial evidence. *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142, 147. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. (2d) 985, 989; *National Labor Relations Board* v. *Thompson Products*, 97 F. (2d) 13, 15; *Ballston-Stillwater Co.* v. *National Labor Relations Board*, 98 F. (2d) 758, 760. We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not "wholly barren of evidence" to

sustain the finding of discrimination, we think that the court referred to substantial evidence. *Ballston-Stillwater Co.* v. *National Labor Relations Board, supra.*

The companies urge that the Board received "remote hearsay" and "mere rumor". The statute provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling".[7] The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 44; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 93; *United States* v. *Abilene & Southern Rwy. Co.,* 265 U. S. 274, 288; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 442. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

Applying these principles, we are unable to conclude that the Board's findings in relation to the matters now under consideration did not have the requisite foundation. With respect to industrial espionage, the companies say that the employment of "outside investigating agencies" of any sort had been voluntarily discontinued prior to November, 1936, but the Board rightly urges that it was entitled to bar its resumption. Compare *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.,* 304 U. S. 257, 260. In relation to the other charges of unfair labor practices, the companies point to the statement of Mr. Carlisle at a large meeting of the employees in April, 1937, when the recognition of the Brotherhood was under discussion, that the employees were absolutely free to join any labor organization,—that they could do as they pleased. Despite this statement and assuming, as counsel for the companies urges, that where two independent labor organizations seek recognition it cannot be said to be an unfair labor practice for the employer merely to express preference of one organization over the other, by reason of the former's announced policies, in the absence of any attempts at intimidation or coercion, we think that there was

[7] Section 10(b); 29 U. S. C. 160(b).

still substantial evidence that such attempts were made in this case.

It would serve no useful purpose to lengthen this opinion by detailing the testimony. We are satisfied that the provisions of the order requiring the companies to desist from the discriminating and coercive practices described in subdivisions (a) to (e) inclusive and in subdivision (h) of paragraph one of its order,[8] and to reinstate the six employees mentioned with back pay, and to post notices assuring freedom from discrimination and coercion as provided in paragraph two of the order, rested upon findings sustained by the evidence and that the decree of the Court of Appeals enforcing the order in these respects should be affirmed.

Fourth.—The Brotherhood contracts.—The findings of the Board that the contracts with the Brotherhood and its locals were invalid, and the Board's order requiring the companies to desist from giving effect to these contracts, present questions of major importance. We approach them in the light of three cardinal considerations. One is that the Brotherhood and its locals are labor organizations independently established as affiliates of the American Federation of Labor and are not under the control of the employing companies. So far as there was any charge, under Section 8(2) of the Act, that the employing companies had dominated or interfered with the formation or administration of any labor organization or had contributed financial or other support to it, the charge was dismissed. Another consideration is that the contracts recognize the right of employees to bargain collectively; they recognize the Brotherhood as the collective bargaining agency for the employees who belong to it, and the Brotherhood agrees for itself and its

[8] These provisions of the order in substance required the companies to desist from discouraging membership in the United or encouraging membership in the Brotherhood, or any other labor organization of their employees, by discharges, or threats of discharge, or refusal of reinstatement, because of membership or activity in connection with any such labor organization; from permitting representatives of the Brotherhood to engage in activities in its behalf during working hours or on the employers' property unless similar privileges were granted to the United and all other labor organizations; from permitting employees who were officials of the Employees' Representation Plans to use the employers' time, property and money in behalf of the Brotherhood or any other labor organization; from employing detectives to investigate the activities of their employees in behalf of the United or other labor organizations, or employing for such purpose any other sort of espionage; and from "in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations" or to bargain collectively or to engage in concerted activities for that purpose or other mutual aid or protection.

members not to intimidate or coerce employees into membership in the Brotherhood and not to solicit membership on the time or property of the employers. The third consideration is that the contracts contain important provisions with regard to hours, working conditions, wages, sickness, disability, etc., and also provide against strikes or lockouts and for the adjustment and arbitration of labor disputes, thus constituting insurance against the disruption of the service of the companies to interstate or foreign commerce through an outbreak of industrial strife. It is not contended that these provisions are unreasonable or oppressive but on the contrary it was virtually conceded at the bar that they are fair to both the employers and employees. It also appears from the evidence, which was received without objection, that the Brotherhood and its locals comprised over 30,000, or 80 per cent of the companies' employees out of 38,000 eligible for membership.

The Brotherhood and its locals contend that they were indispensable parties and that in the absence of legal notice to them or their appearance, the Board had no authority to invalidate the contracts. The Board contests this position, invoking our decision in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. That case, however, is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of Section 8(2). The statement that the "Association" so formed and controlled was not entitled to notice and hearing was made in that relation. *Id.*, pp. 262, 270, 271. It has no application to independent labor unions such as those before us. We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. *Russell* v. *Clark's Executors*, 7 Cranch, 69, 96; *Mallow* v. *Hinde*, 12 Wheat. 193, 198; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235; *Garzot* v. *de Rubio*, 209 U. S. 283, 297; *General Investment Co.* v. *Lake Shore Railway Co.*, 260 U. S. 261, 285. The rule, which was applied in the cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here. See *Mallow* v. *Hinde, supra.*

The Board urges that the National Labor Relations Act does not contain any provision requiring these unions to be made parties;

that Section 10(b)[9] authorizes the Board to serve a complaint only upon persons charged with unfair labor practices and that only employers can be so charged. In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it and also as to the validity of the Act if so construed. But the Board contends that the Brotherhood had notice, referring to the service of a copy of the complaint and notice of hearing upon a local union of the Brotherhood on May 12, 1937, and of an amended notice of hearing on May 25, 1937. Petitioners rejoin that the service was not upon a local whose rights were affected but upon one whose members were not employees of the companies' system. The Board says, however, that the Brotherhood, and the locals which were involved, had actual notice and hence were entitled to intervene (Sec. 10(b)) and chose not to do so. But neither the original complaint—which antedated the contracts—nor the subsequent amendments contained any mention of them and the Brotherhood and its locals were not put upon notice that the validity of the contracts was under attack. The Board contends that the complaint challenged the legality of the companies' "relations" with the Brotherhood. But what was thus challenged cannot be regarded as going beyond the particular practices of the employers and the discharges which the complaint described. In these circumstances it cannot be said that the unions were under a duty to intervene before the Board in order to safeguard their interests.

The Board urges further that the unions have availed themselves of the opportunity to petition for review of the Board's order in the Court of Appeals, and that due process does not require an opportunity to be heard before judgment, if defenses may be presented upon appeal. *York* v. *Texas*, 137 U. S. 15, 20, 21; *American Surety Company* v. *Baldwin*, 287 U. S. 156, 168; *Moore Ice Cream Company* v. *Rose*, 289 U. S. 373, 384. But this rule assumes that the appellate review does afford opportunity to present all available defenses including lack of proper notice to justify the judgment or order complained of. *Id.*

Apart from this question of notice to the unions, both the companies and the unions contend that upon the case made before the

[9] 29 U. S. C. 160(b).

Board it had no authority to invalidate the contracts. Both insist that that issue was not actually litigated, and the record supports that contention. The argument to the contrary, that the contracts were necessarily in issue because of the charge of unfair labor practices against the companies, is without substance. Not only did the complaint as amended fail to assail the contracts but it was stated by the attorney for the Board upon the hearing that the complaint was not directed against the Brotherhood; that "no issue of representation (was) involved in this proceeding"; and that the Board took the position that the Brotherhood was "a *bona fide* labor organization" whose legality was not attacked. But the Board says that on July 6th (the last of the contracts having been made on June 16th) the companies amended their answer stating that the making of the contracts had rendered the proceeding moot, and that this necessarily put the contracts in issue. We cannot so regard it. We think that the fair construction of the position thus taken on the last day of the hearings was entirely consistent with the view that the validity of the contracts had not been, and was not, in issue. And the counsel for the companies point to their brief before the Board, which they produce, as proceeding on the basis that the validity of the contracts had not been assailed.

Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of Section 10(c).[10] That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices "and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act". We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to

[10] 29 U. S. C. 160(c).

thwart the purposes of the Act. The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices. Compare *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra*. Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective.

The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7[11] the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. On this point the contracts speak for themselves. They simply constitute the Brotherhood the collective bargaining agency for those employees who are its members. The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. Section 9(c).[12] Upon this record, there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused

[11] 29 U. S. C. 157.
[12] 29 U. S. C. 159(c).

by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to "affect commerce" in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.

The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency would appropriately extend to the practices of the employers to which the complaint was addressed. See *Jones* v. *Securities Commission*, 298 U. S. 1, 15. It did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf.

Apart from this, the main contention of the Board is that the contracts were the fruit of the unfair labor practices of the employers; that they were "simply a device to consummate and perpetuate" the companies' illegal conduct and constituted its culmination. But, as we have said, this conclusion is entirely too broad to be sustained. If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge. Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by any illegal conduct on the part of the employers. The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and

unwarranted assumption. The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice.

We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order.

Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brotherhood "as the exclusive representative of their employees" stands on a different footing. The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of "representation" should arise. Section 9.[13] We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law.

The provision of paragraph two of the order as to posting notices should be modified so as to exclude any requirement to post a notice that the existing Brotherhood contracts have been abrogated.

The decree of the Circuit Court of Appeals is modified so as to hold unenforceable the provision of subdivision (f) of paragraph one of the order and the application to that provision of paragraph two subdivision (c), and as so modified the decree enforcing the order of the Board is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[13] 29 U. S. C. 159.

SUPREME COURT OF THE UNITED STATES.

Nos. 19, 25.—October Term, 1938.

Consolidated Edison Company of New York, Inc., and its Affiliated Companies, et al., Petitioners,
19 *vs.*
National Labor Relations Board, et al.

International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers, Local Union No. B-825, et al., Petitioners,
25 *vs.*
National Labor Relations Board, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 5, 1938.]

Mr. Justice Butler.

I agree with the Court's decision that the Board was without authority to require employers to cease and desist from giving effect to the contracts referred to in subdivision (f) of the first paragraph of the order. And I am of opinion that the entire order should be set aside.

The Board was without jurisdiction. The facts on which it assumed to exert power need not be narrated; they are sufficiently stated by the lower court and in the opinion here. Both courts rightly treat the case as one where neither employers nor employees are engaged in interstate or foreign commerce. Here, the employers are engaged solely in intrastate activities. A very small percentage of the products, furnished in that State to others, is by the latter used in interstate commerce. This Court has held that Congress cannot regulate relations between employers and employees engaged exclusively in intrastate activities.

In *Schechter Corp.* v. *United States* (May, 1935), 295 U. S. 495, decided shortly before passage of the National Labor Relations Act, we held that the federal government cannot regulate the wages and hours of labor of persons employed in the internal commerce of the State.

In *Carter* v. *Carter Coal Co.* (May, 1936), 298 U. S. 238, decided shortly after passage of the National Labor Relations Act, we held that provisions of the Bituminous Coal Conservation Act of 1935 looking to the control of wages, hours, and working conditions of persons engaged in producing coal about to move in interstate commerce and seeking to guarantee their right of collective bargaining, were beyond the power of Congress, for the reasons that it has no general power of regulation to promote the general welfare; that the power to regulate commerce does not include the power to control the conditions in which coal is produced; that the effect upon interstate commerce of labor conditions involved in the production of coal, including disputes and strikes over wages and working conditions, is indirect.

In the period, less than a year, intervening between the *Carter* case and *Labor Board* v. *Jones & Laughlin* (April, 1937), 301 U. S. 1, and other Labor Board cases decided on the same day,[1]—and, as I think, wrongly decided—it was, on the authority of the *Schechter* and *Carter* cases, held by four circuit courts of appeals and six district courts that the power of Congress does not extend to regulations between employers and their employees engaged in local production. Their decisions are cited in the dissenting opinion in the *Labor Board* cases. 301 U. S. 76. In that period the lower courts were bound by our decisions to condemn the National Labor Relations Act, construed to apply to production or intrastate commerce, as not within the power of Congress.

This case is not distinguishable from the *Schechter* case or the *Carter* case. There, as here, the activities of the employers and their employees were exclusively local. It differs from the *Jones & Laughlin* case and all the other Labor Board cases.[2] In each of them, the employer was to an extent engaged in interstate commerce. The opinion just announced points to no distinction

[1] Labor Board *v.* Fruehauf Co., 301 U. S. 49. Labor Board *v.* Clothing Co., 301 U. S. 58. Associated Press *v.* Labor Board, 301 U. S. 103. Washington Coach Co. *v.* Labor Board, 301 U. S. 142.

[2] Labor Board *v.* Fruehauf Co., 301 U. S. 49. Labor Board *v.* Clothing Co., 301 U. S. 58. Associated Press *v.* Labor Board, 301 U. S. 103. Washington Coach Co. *v.* Labor Board, 301 U. S. 142. Labor Board *v.* Greyhound Lines, 303 U. S. 261. Labor Board *v.* Pacific Lines, 303 U. S. 272. Santa Cruz Co. *v.* Labor Board, 303 U. S. 453. Labor Board *v.* Mackay Radio & T. Co., 304 U. S. 333.

between this case and the *Schechter* or *Carter* case. Nor does it refer to the Labor Board cases as controlling here. But, to support this federal advance into local fields, the Court brings forward three railroad rate cases: *Houston & Texas Ry.* v. *United States* (*The Shreveport Case*), 234 U. S. 342; *Wisconsin R. R. Com.* v. *C., B. & Q. R. R. Co.*, 257 U. S 563; and *New York* v. *United States*, 257 U. S. 591.

These cases give no support to the idea that, in absence of conflict between state and federal policy or regulation, Congress has power to control labor conditions in production or intrastate transportation. In each, the federal interference is shown necessary in order to protect national authority, interstate commerce, and interstate rates established under federal law. Brief reference to the conditions that led up to these cases and the substance of the decisions will be sufficient to show they have no application here.

In 1906 and 1907, Minnesota reduced intrastate rates substantially below lawfully established interstate rates. Suits were brought by their stockholders to restrain the carriers from obeying, and state officers from enforcing, the local rates on the ground, *inter alia*, that they were repugnant to the commerce clause and that enforcement would necessarily interfere with and burden interstate transportation by the carriers. The *Minnesota Rate Cases*, 230 U. S. 352. The controversy was everywhere regarded as important. See p. 395. The facts found by the special master and adopted by the circuit court are stated in its opinion (*Shepard* v. *Northern Pac. Ry. Co.* (1911), 184 F. 765, 775-794) and summarized in the opinion of this Court. pp. 381-395. They show that the intrastate rates discriminated against interstate commerce and made it impossible for the carriers to collect, or for the United States to enforce, valid higher interstate rates. The trial court held the state measures repugnant to the commerce clause and upon that ground, among others, enjoined enforcement of the rates they prescribed.

The cases were argued here in April, 1912, and decided June 9, 1913. This Court upheld the state rates, notwithstanding the commerce clause, the Act to Regulate Commerce, the interstate rates lawfully established in accordance with federal law, and the destructive discrimination. It held that, in the absence of a finding

by the Interstate Commerce Commission of unjust discrimination, the intrastate rates were valid. The opinion reserved, p. 419, the question whether the Commission was empowered to make the determination. And that question was decided in the *Shreveport* case, 234 U. S. 342, 357.

That case was pending here before the decision in the *Minnesota Rate Cases*, and was decided in June, 1914. The Interstate Commerce Commission had found that rates prescribed by Texas operated to discriminate against interstate traffic from Shreveport, Louisiana, into Texas moving on lawfully established interstate rates. In order to eliminate the discrimination, the Commission directed the carriers to cease charging higher rates for interstate transportation than those charged for transportation between Texas points. This Court held the carriers free to raise the intrastate rates so as to remove the discrimination.

Wisconsin R. R. Com. v. *C., B. & Q. R. R. Co.* (1922), 257 U. S. 568, upheld § 15a of the Interstate Commerce Act, added by § 422, Transportation Act, 1920, which empowered the Interstate Commerce Commission to remove discrimination resulting from intrastate rates unduly low, as compared with corresponding rates fixed under that section.

New York v. *United States*, 257 U. S. 591, held that intrastate rates so low that they discriminated against interstate commerce within the meaning of the Transportation Act, 1920, may constitutionally be increased under that Act by the Commission to conform with like rates in interstate commerce fixed by it.

The constitutional questions decided in these three cases were essentially different from the one of federal power here presented. The state measures there overborne were repugnant to existing federal regulations of interstate commerce. Application of the lower state rates made it impossible for federal authority to require, or to enable, carriers to collect interstate rates lawfully established as just and reasonable. The policy and provisions of the New York State Labor Relations Act are in substance precisely the same as the national policy and the National Labor Relations Act. The State's interest, purpose, and ability to safeguard against possible interruption of production and service by labor disputes are not less than those of the federal government. The State's need

of continuous service is immediate, while the effect of interruption on interstate or foreign commerce would be mediate, indirect, and relatively remote. The record fails to disclose any condition, existing or threatened, to suggest as necessary federal action to protect interstate commerce, or any other interest of the government against interruption or interference liable to result from controversies between these employers and their employees. The right of the States, consistently with national policy and law, freely to exert the powers safeguarded to them by the Federal Constitution is essential to the preservation of this government. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13. *Kidd* v. *Pearson*, 128 U. S. 1, 21. Asseveration of need to uphold our dual form of government and the safeguards set for protection of the States and the liberties of the people against unauthorized exertion of federal power, does not assure adherence to, or conceal failure to discharge, duty to support the Constitution. See *Schechter Corp.* v. *United States, supra*, 548-550. Cf. *Labor Board* v. *Jones & Laughlin, supra*, 29-30.

Mr. Justice McReynolds concurs in this opinion.

SUPREME COURT OF THE UNITED STATES.

Nos. 19, 25.—October Term, 1938.

Consolidated Edison Company of New York, Inc., and its Affiliated Companies, et al., Petitioners,
19 vs.
National Labor Relations Board, et al.

International Brotherhood of Electrical Workers, et al., Petitioners,
25 vs.
National Labor Relations Board, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 5, 1938.]

Mr. Justice Reed concurring in part, dissenting in part.

While concurring in general with the conclusions of the Court in *Consolidated Edison Company* v. *N. L. R. B.* and *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, I find myself in disagreement with the conclusion that the National Labor Relations Board was "without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order." In that paragraph the petitioner companies are ordered to:

"I. Cease and desist from:

(f) Giving effect to their contracts with the International Brotherhood of Electrical Workers."

It is agreed that the "fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife." This is to be accomplished by contracts with labor organizations, reached through collective bargaining. The labor organizations in turn are to be created through the self-organization of workers, free from interference, restraint or coercion of the employer.[1] The forbidden interference is an unfair labor practice, which the Board, exclusively,

[1] Labor Board Cases, 301 U. S. 1.

is empowered to prevent by such negative and affirmative action as will effectuate the policies of the Act.[2] To interpret the Act to mean that the Board is without power to nullify advantages obtained by the Edison companies through contracts with unions, partly developed by the unlawful interference of the Edison companies with self-organization, is to withdraw from the Board the specific authority granted by the Act to take affirmative action to protect the workers' right of self-organization, the basic privilege guaranteed by the Act. Freedom from employer domination flows from freedom in self-organization.

It is assumed that the terms of these contracts in all respects are consistent with the requirements of the National Labor Relations Act and are in themselves, considered apart from the actions of the Edison companies in securing their execution, advantageous in preserving industrial harmony.

The Board found that the Consolidated Edison Company and its affiliates, the respondents before the Board,

"deliberately embarked upon an unlawful course of conduct, as described above, which enabled them to impose the I. B. E. W. upon their employees as their bargaining representative and at the same time discourage and weaken the United which they opposed. From the outset the respondents contemplated the execution of contracts with the I. B. E. W. locals which would consummate and perpetuate their plainly illegal course of conduct in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to them under Section 7 of the Act. It is clear that the granting of the contracts to the I. B. E. W. by the respondents was a part of the respondents' unlawful course of conduct and as such constituted an interference with the rights of their employees to self-organization. The contracts were executed under such circumstances that they are invalid, notwithstanding that they are in express terms applicable only to members of the I. B. E. W. locals. If the contracts are susceptible of the construction placed upon them by the respondents, namely, that they were exclusive collective bargaining agreements, then, *a fortiori*, they are invalid."[3]

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[2] Secs. 7, 8, 10, Act of July 5, 1935, 49 Stat. 452-55.
[3] 4 N. L. R. B. 71, 94.

The evidence upon which this finding is based is summarized in detail in 4 N. L. R. B., pages 83 to 94. It shows a consistent effort on the part of the officers and foremen of the Edison Company and its affiliates, as well as other employees of the Edison companies—formerly officers in the recently disestablished "Employees' Representation Plans," actually company unions—to further the development of the I. B. E. W. unions by recognition, contracts for bargaining, openly expressed approval, establishment of locals and by permitting solicitation of employees on the time and premises of the Edison companies. By the Wagner Act employees have "the right to self-organization." It is an "unfair labor practice for an employer" to "interfere with, restrain or coerce employees" in the exercise of that right.[4] The Board concluded that the contracts with the I. B. E. W. unions were a part of a systematic violation by the Edison companies of the workers' right to self-organization.

This determination set in motion the authority of the Board to issue an order to cease and desist from the unfair labor practice and to take "such affirmative action . . . as will effectuate the policies of this Act." The evidence was clearly sufficient to support the conclusion of the Board that the Edison companies entered into the contracts as an integral part of a plan for coercion of and interference with the self-organization of their employees. This justified the Board's prohibition against giving effect to the contracts. The "affirmative action" must be connected with the unfair practices but there could be no question as to the materiality of the contracts. As this Court, only recently, said, as to the purpose of the Congress in enacting this Act:

"It had before it the *Railway Clerks* case which had emphasized the importance of union recognition in securing collective bargaining, Report of the Senate Committee on Education and Labor, S. Rep. 573, 74th Cong., 1st Sess., p. 17, and there were then available data showing that once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other."[5]

To this, it is answered that the extent of the coercion is left to "mere conjecture"; that it would be an "extravagant" assumption to say that none of the 30,000 members "joined vol-

[4] Secs. 7 and 8, Act of July 5, 1935, 49 Stat. 452.
[5] N. L. R. B. v. Pennsylvania Greyhound Lines, 303 U. S. 261, 267.

untarily."; and that the "employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice."[6] On the question whether or not the Edison companies' activities as to these contracts were a part of a definite plan to interfere with the right of self-organization, these answers are immaterial. It is suggested that the problem of the contracts should be approached with three cardinal considerations in mind: (1) that one contracting party is an "independently established" labor organization, free of domination by the employer; (2) that the contracts grant valuable collective bargaining rights; and (3) that they contain provisions for desirable working privileges. Such considerations should affect discretion in shaping the proper remedy. They are negligible in determining the power of the Board. They would, if given weight, permit paternalism to be substituted for self-organization. The findings of the Board, based on substantial evidence, are conclusive.[7] There was evidence of coercion and interference, and the Board did determine that the policies of the Act would be effectuated by requiring the companies to cease giving effect to these contracts.

The petitioners, however, aside from the merits, raise procedural objections. It is contended that before the Board could have authority to order the Edison companies to cease and desist from giving effect to their contracts with the unions, it was necessary that the unions as well as the Edison companies should have legal notice or should appear; that the unions were indispensable parties. This Court has held to the contrary in *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. This case determined that where an employer has created and fostered a labor organization of employees, thus interfering with their right to self-organization, the employer can be required without notice to the organization, to withdraw all recognition of such organization as the representative of its employees. It is said that this case "is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of Sec. 8(2)."[8] In the instant

[6] Consolidated Edison Co. *v.* N. L. R. B., Nos. 19 and 25, this Term, rendered this day.

[7] Washington Coach Co. *v.* Labor Board, 301 U. S. 142, 146.

[8] Consolidated Edison Co. *v.* N. L. R. B., Nos. 19 and 25, this Term, decided this day.

case it was found that no such domination existed. In the *Greyhound* case, the Board found not only domination under Sec. 8(2) but also, as in this case, an unfair labor practice under Sec. 8(1). The company's violation of Sec. 8(1) was predicated on its interference with self-organization.[9] In the *Greyhound* case it was said that the organization was not entitled to notice and hearing because "the order did not run against the Association."[10] Here the unions are affected by the action on the contracts, exactly as the labor organization in the *Greyhound* case was affected by the order to withdraw recognition. It would seem immaterial whether those contracts were violative of one or both or all the prohibited unfair labor practices.

A further procedural objection is found in the failure of the complaint, or any of its amendments, to seek specifically a cease and desist order against continued operation under the contracts. The companies were charged with allowing organization meetings on the company time and on company property, permitting solicitation of membership during company time, and paying overtime allowances to those engaged in soliciting or coercing workers to join the contracting unions. The complaint said that similar aid was not extended to a competing union and that office assistance was given to the effort to get members for the contracting unions. These charges made it obvious that the contracts were obtained from the unions which were improperly aided by the Edison companies in violation of the prohibitions against interference with self-organization. Contracts so obtained were necessarily at issue in an examination of the acts in question.

Certainly the Edison companies and the contracting unions could have been allowed on a proper showing a further hearing on the question of the companies continuing recognition of the contracts. By section 10(f) the Edison companies and the unions could obtain a review of the Board's order. In that hearing either or both could show to the court [Sec. 10(e)] that additional evidence as to the contracts was material and that it had not been presented because the aggrieved parties had not understood that the contracts were subject to a cease and desist order or had not known of the proceeding. The court could order the Board to take the ad-

[9] N. L. R. B. v. Pennsylvania Greyhound Lines, 303 U. S. 261, 263.
[10] *Id.*, 271.

ditional evidence. This simple practice was not followed. Although all parties were before the lower court on the review, the petitioners chose to rely on the impotency of the Board to enter an order affecting the contracts.

In these circumstances the provision of the order requiring the Edison companies to cease from giving effect to their contracts with the contracting unions is proper. This order prevents the Edison companies from reaping an advantage from those acts of interference found illegal by the Board.

Mr. Justice BLACK concurs in this opinion.